U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29343832

Date: JAN. 23. 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner, a global security expert, seeks classification as an alien of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner met the initial evidence requirement for the requested classification by meeting the requirements of at least three of the evidentiary criteria under 8 C.F.R. § 204.5(h)(3). The Petitioner subsequently filed a combined motion to reopen and motion to reconsider which was dismissed as untimely filed. The matter is now before us on appeal. 8 C.F.R. § 103.3.[1]

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

To establish eligibility as an individual of extraordinary ability, a petitioner (or anyone on the petitioner's behalf) must establish that they:

- Have extraordinary ability in the sciences, arts, education, business, or athletics;
- Seek to enter the United States to continue work in their area of extraordinary ability; and that
- Their entry into the United States will prospectively substantially benefit the United States.

[1] The Petitioner initially timely filed this appeal on May 26, 2023, but it was rejected based upon an incorrect or missing filing fee. However, that rejection was erroneous, as United States Citizenship and Immigration Services (USCIS) records confirm that a check in the correct amount accompanied this filing. Because the Petitioner refiled the appeal within 33 days of the issuance of the erroneous rejection notice, we will consider the appeal to be timely filed.

Extraordinary ability must be demonstrated by evidence of sustained national or international acclaim as well as extensive documentation that their achievements have been recognized in the field. Section 203(b)(1) of the Act.

The implementing regulation further states that the term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." It also sets forth a multi-part analysis. A petitioner can demonstrate international recognition of their achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If such evidence is unavailable, then they must alternatively provide evidence that meets at least three of the ten listed criteria, which call for evidence about other awards they may have received, published material about them in qualifying media, and their authorship of scholarly articles, among other types of evidence. 8 C.F.R. §§ 204.5(h)(2),(3).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination, assessing whether the record shows that the individual possesses the acclaim and recognition required for this highly exclusive immigrant visa classification. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. ANALYSIS

A. Dismissal of Motion as Untimely Filed

The first issue before us on appeal is whether the Director properly dismissed the Petitioner's motion to reopen as untimely filed. The record indicates that the Director's decision was issued on October 5, 2021, and that the Petitioner's motion to reopen was received by USCIS on December 6, 2021, 62 calendar days later. Although this is outside of the 33 days allowed by regulation, USCIS announced filing flexibilities related to the COVID 19 pandemic in March 2020. In the announcement of the final extension to these flexibilities on January 24, 2023, USCIS confirmed that a Form I-290B, Notice of Appeal or Motion, would be considered if it was filed up to 60 days from the issuance of a decision made between March 1, 2020 and October 31, 2021.[2] Therefore, since the decision was issued during this timeframe and the Petitioner's motion was received within 63 days of the decision, the Director improperly dismissed the motion as untimely.[3] We therefore withdraw the Director's motion decision and remand this matter for his consideration of the entirety of the record, including the Petitioner's motion and appeal briefs and supporting documentation.

B. Eligibility as an Individual of Extraordinary Ability

In his initial filing, the Petitioner claimed that he meets nine of the evidentiary criteria under 8 C.F.R. § 204.5(h)(3), and referenced documentation in the record that he asserted supported those

[2] https://www.uscis.gov/newsroom/alerts/uscis-extends-covid-19-related-flexibilities-1

[3] Since the regulation at 8 C.F.R. § 103.8(b) adds 3 days to a response period when a notice is served by mail, the Petitioner had 63 days to submit his motion.

claims. However, when issuing a request for evidence (RFE), the Director addressed the evidence submitted only under the criterion at 8 C.F.R. § 204.5(h)(3)(i), in addition to seeking further evidence regarding the requirements at sections 203(b)(1)(A)(ii) and (iii) of the Act.[4] Although the Director also generally noted the need for documents in a foreign language to be accompanied by certified English translations per 8 C.F.R. § 103.2(b)(3), he did not describe the deficiencies in the evidence relating to the other eight evidentiary criteria claimed by the Petitioner, and did not seek further evidence in support of those criteria. The purpose of an RFE is to give a petitioner adequate notice of deficiencies in the record and provide sufficient information for a response, but here the Director did neither. 8 C.F.R. § 103.2(b)(8)(iv).

In addition, the Petitioner appears to have responded not only to the issues raised in the RFE in his response, but also addressed three more of the previously claimed criteria. Yet, the Director's decision again considered only the evidence submitted under the criterion for lesser nationally or internationally recognized awards. An officer must fully explain the reasons for denying a visa petition in order to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See* 8 C.F.R. § 103.3(a)(i); see also *Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994)(finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal). Because the Director's decision did not do so, we will withdraw it and remand the matter for further action and entry of a new decision. On remand, the Director should review and consider each of the Petitioner's claims, and consider all of the evidence in the record, including the evidence submitted on motion and appeal. If after conducting this review the Director determines that additional evidence is needed, the Director issue either an RFE or notice of intent to deny.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[4] We note that our review of the Petitioner's response to the RFE is based upon a copy included in the Petitioner's appeal. On remand, the Director should ensure that the Petitioner's original response is incorporated into the record of proceeding for reference in any further actions.